

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS RAY JONES,

Defendant-Appellant.

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UNPUBLISHED

September 27, 2005

No. 254495

Ingham Circuit Court

LC No. 03-000579-FC

Before: Bandstra, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of bank robbery, MCL 750.531, for which he was sentenced to 200 to 360 months' imprisonment. On appeal, defendant challenges the trial court's exclusion of a defense witness that was requested for the first time on the fourth day of trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On July 6, 2002, the Fifth Third bank on South Pennsylvania in Lansing was robbed at 10:49-10:50 a.m. The robber wore a hat and held a hair weave up to his face in the bank. He told a teller to give him money. That teller gave him money from her drawer as well as money from another nearby teller. Both tellers included bait money and money containing red dye packets that exploded shortly after the robber left the bank.

The robber did not have a bag, and the teller stated that she did not have one to give him. There was money found both in the bank and outside the bank that had been dropped by the robber. A note was also found outside the bank near some of the money that was dropped. That note said, "give me the money hurry."

The note was written on the backside of half of a section 8 housing letter that eventually led the police to talk to defendant's sister and her boyfriend, neither of whom fit the description of the robber. They led the police in the direction of defendant. Additionally, the police found a car that was believed to be involved in the robbery. That car was registered to defendant's girlfriend who testified that defendant had the car the morning of the robbery. When the car was found it had multiple red spots inside and on a washcloth in the trunk. All of those red spots matched the chemical compound of the bank's dye packets. There was also testimony by defendant's girlfriend that she saw red on defendant's forearm that morning. That testimony,

however, was somewhat contradicted by another witness who said she saw defendant around 10 or 10:30 a.m. that morning and did not notice any red on his arms.

There was also testimony by the teller who said that even though she did not recognize defendant during the robbery, she made the connection later when she saw his name on a subpoena. The teller lived across the street from defendant when they were children. The teller moved away for twenty years, but returned in 2002 and saw defendant once that year when he was dating the teller's sister. At the time of trial, the teller had no doubt that defendant was the robber.

At the beginning of the trial, the judge granted the prosecutor's request that all witnesses be sequestered from the courtroom. He also reviewed the witness lists provided by the prosecution and decided to read all of the potential witness' names to the jury even though the prosecution anticipated deleting one list of names. Defendant did not have any additional witness names, but stated to the court that all witnesses on the prosecutor's lists were available to him as well.

On the fourth day of trial, defendant requested that the court allow a witness, Ms. Simmons, to testify on his behalf. According to defendant, Ms. Simmons was unknown to him at the beginning of trial and was willing to testify that she had picked up defendant on the morning of the robbery and did not see red stains on his arms.

The trial court reviewed the circumstances with both parties. Those circumstances included what Ms. Simmons was likely to testify to as well as the following: Ms. Simmons was defendant's niece, she had been in the courtroom earlier in the trial and heard that witnesses were to be sequestered, she was not listed on any witness list, and she had been aware of the case for over thirteen months because she was present when defendant's sister's house was searched on the day of the robbery, but she did not speak to the police at that time or any other time. The trial court's decision was to exclude Ms. Simmons as a witness.

A trial court's decision whether to add or delete a witness is reviewed for an abuse of discretion. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003).

An abuse of discretion is found when the trial court's decision is so grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Id.*

A trial court retains its discretionary authority to exclude a witness even when the witness was not aware of a court's sequestration order and when defense counsel was not aware of the witness' existence until after the trial began. *People v Dickerson*, 62 Mich App 457, 459-460; 233 NW2d 612 (1975). In this case it appears that the witness heard the sequestration order, and knew of the case for over thirteen months even if she was not known to defendant as a witness prior to the trial.

Further, Michigan statutes provide that “[a] defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown.” MCL 767.94a(3). Subsection (1) requires a defendant to disclose the name and address of each witness defendant intends to call at trial upon request by the prosecuting attorney. MCL 767.94a(1). In this case, the prosecuting attorney served such a request on July 28, 2003 and at the time the trial began on August 25, 2003, defendant had not disclosed any witnesses except those that were disclosed by the prosecuting attorney.

The trial court did not find good cause to allow Ms. Simmons to testify when it noted several concerns including: Ms. Simmons was defendant’s niece, she was aware of the case for over thirteen months and had not spoken to police previously, she was not listed on any witness list, and her recollection concerning her testimony came after she sat in the courtroom for a period of time including when the sequestration order was given. In addition, the testimony of Ms. Simmons would have been cumulative to that of Ann Brace who testified at trial that she saw defendant around 10 or 10:30 a.m. and did not notice any red dye on his arms.

Based on all of the circumstances surrounding defendant’s request to have Ms. Simmons allowed as a defense witness, an unprejudiced person could not say that there was no justification for the trial court’s decision or that its decision was contrary to fact and logic. *Callon, supra*. The trial court did not abuse its discretion in excluding Ms. Simmons as a witness.

Affirmed.

/s/ Richard A. Bandstra  
/s/ Janet T. Neff  
/s/ Pat M. Donofrio